JTH Tax, Inc. v. Whitaker Doc. 39

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE Plaintiff/ Counter-Defendant	:	
vs.	:	Civil No. 2:07CV170
KENYA WHITAKER, et al. Defendants/ Counterclaimants.	:	

COUNTERCLAIM

Defendants/Counterclaimants Kenya Whitaker and Easy Software Solutions, LLC (collectively "ESS") file this Counterclaim and states as follows:

PARTIES

1. Counterclaimants Easy Software Solutions is a Texas Limited Liability Company with its principal place of business at 3921 Duval Drive, Carrolton, Texas 75010 and Kenya Whitaker is a citizen and resident of Texas

2. Counter-defendant JTH Tax, Inc. d/b/a Liberty Tax Service ("Liberty") is a Delaware corporation with its principal place of business at 1716 Corporate Landing Parkway, Virginia Beach, VA 23454.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332 since Liberty has sued defendant Whitaker alleging violations of U.S. trademark laws, seeking recovery of almost $200,000.00 in damages, and since there is a complete diversity of citizenship between the parties.

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4. Venue is proper in this Court under 28 U.S.C. §§ 1391(a) and 1391(b). A substantial part of the events or omissions giving rise to the claim occurred in the Eastern District of Virginia.

FACTS

5. In July 2003, Liberty and Whitaker entered into a franchise agreement, (hereinafter the "Agreement"). On August 14, 2003, ESS became the franchisee under the Agreement and Whitaker was released from all obligations to perform under the Agreement itself, remaining liable only as a guarantor.

6. Under the Agreement, Liberty promised to provide "special marketing techniques and operating procedures to facilitate the provision of tax return preparation and related services." It also promised to provide or recommend a source for tax return preparation software as well as support for franchisee's preparation and use of such tax preparation software. In addition, Liberty promised to provide the ability to electronically file tax returns, a refund application loan program, advanced training, aid in obtaining needed supplies, and financing to franchisees.

7. In fact, however, Liberty did not fully perform on its obligations under the Agreement and ESS found that the software it was required to use actually hampered its business efforts rather than promoted them. For instance, in January, 2004, ESS began operations as a Liberty franchisee at with a projection to file 800 individual tax returns. This projection was based on the understanding that Liberty would provide the promised corporate advertising support in the area of five percent (5%) of the marketing budget.

8. That support never materialized. Instead, it was ESS that spent significant amounts on marketing for sporting event promotions, radio advertisements, coupon distribution, parades, etc. in its attempt to generate additional business. Liberty never approved or provided any radio or television advertisements or other significant marketing support; its "marketing support" consisted of taking out an ad in the Yellow Pages.

9. Liberty undermined ESS's efforts by allowing another Liberty franchisee to prepare free returns in ESS's designated area. Despite bringing this problem to Liberty's attention, Liberty did nothing to stop the marketing within the ESS territory until ESS threatened to sue for breach of contract for not supporting ESS as its franchisee.

10. In addition, in February 2004, Liberty began intercepting revenues destined for ESS. After much wrangling, Liberty finally told ESS that it had withheld sums due ESS and applied them toward a promissory note Liberty had encouraged ESS to sign for the balance of its franchisee fee. Thereafter, ESS paid off that promissory note to avoid any further "fee intercepts."

11. While ESS tried to expand and raise the stature and visibility of Liberty's business in this market, Liberty undermined those efforts. In July 2004, ESS principal, Byron Whitaker, initiated conversations with Hunt Sports Group and the Dallas Burn regarding the possibility that Liberty would purchase the naming rights to the new MLS soccer stadium in Frisco, Texas, as well as their interest in investing in the development of Liberty franchises within the DFW Metroplex. His efforts soon bore fruit.

12. In August 2004, members from the Hunt Sports Group attended a Liberty Tax Service Open House for those interested in becoming franchisees. Soon thereafter, a meeting and presentation personally hosted by Lamar Hunt was arranged for Liberty representatives regarding the naming of the Frisco development for Liberty, as well as the plans by the Hunt Sports Group to invest in Liberty Tax Service as area developers for the DFW Metroplex.

13. Instead of capitalizing on this opportunity the Liberty representatives shamed and embarrassed the ESS principals in attendance. During the meeting, Liberty official John Hewitt commented that the Hunt Sports Group audience "was not his target market" and that money "was made off of the poor." The fallout from the actions of the Liberty representatives crippled ESS's ability to develop future business with the Hunt entities.

14. In September 2004 Liberty contacted ESS to urge it to expand and purchase additional territory in the DFW Metroplex. Because of Liberty's prior bad conduct, ESS declined that offer. Soon thereafter Liberty made a written offer for ESS to become its "area developer" for the DFW Metxoplex; again the offer was declined.

15. Notwithstanding Liberty's marketing failures, ESS continued to perform under its franchise agreement. Over the next two tax seasons (2005 and 2006), EFSS prepared approximately 670 and 700 returns, respectively.

16. Then, in September 2006, Liberty announced that ESS would be required to use Liberty's new "LibTax" software for the upcoming 2007 tax season. Moreover, Liberty announced it would no longer pay for even the Yellow Pages advertising as it had in previous years.

17. In October 2006, Liberty sent the new LibTax software for use on ESS's computers and offered a group training session for the new LibTax software. Significant problems with the new software required ESS to repeatedly seek technical support from Liberty, and support was either slow or nonexistent.

18. In January 2007, a Liberty representative visited the ESS office unannounced to perform "operational review." Despite the surprise nature of the visit, no issues with the front or back office or marketing materials were noted.

19. The problems with the new LibTax software continued into the 2007 tax season, crippling ESS's revenues. ESS had to notify Liberty of problems with validation errors when processing Pay Stub Loans, "bank reject errors" that arose using the software, various "unknown errors" which popped up when returns were loaded, and timeliness issues with a customer's excise tax credits when using LibTax - a problem that resulted in the customer choosing to have their return prepared elsewhere and attendant loss of revenue and future business. Responses from Liberty showed that it was receiving similar complaints at its national office regarding the new LibTax software.

20. In February, 2007, a second unannounced review of the ESS offices was conducted by Liberty. The Liberty agent, Geoff Knapp, was overtly hostile and unprofessional as he demanded to see individual files of tax returns. When Ms. Whitaker refused to disclose that information based on Mr. Knapp's threatening manner and the absence of her business partner, Mr. Knapp left - all the while demanding that Ms. Whitaker show him the files or the franchise agreement would be terminated. Indeed, Knapp was so unprofessional and threatening that an ESS customer - taken aback by Mr. Knapp's actions - asked if Ms. Whitaker was all right after the harassment she had received from Mr. Knapp. Ultimately, the customer left ESS without even completing his purpose for coming into the office.

21. When Mr. Knapp later called the ESS office and again demanded that Ms. Whitaker show him the files, he was told that his loud and disrespectful behavior in front of the ESS tax preparers and customers would not be tolerated, but that Ms. Whitaker would arrange a meeting with him once her business partner was available to attend. Indeed, the second principal of ESS, Byron Whitaker, even followed up with an email invitation to Mr. Knapp asking to schedule a meeting for to resolve the issues created by Mr. Knapp's action. ESS received no response from either Mr. Knapp or Liberty's corporate headquarters.

22. Instead, ESS received a letter from Liberty terminating its franchise agreement. ESS accepted that termination in writing, sent Liberty a cashier's check for payment of all outstanding amounts due to Liberty, and returned to Liberty all its files via overnight delivery.

23. Liberty continues to harass Ms. Whitaker and ESS. First, Liberty has directly interfered with ESS's business; an ESS customer has actually told ESS that Liberty Tax Service contacted her and told her that she should not do business with Byron Whitaker or his office.

24. In April 2007, Liberty sued Ms. Whitaker and ESS in this Court for breach of the franchise agreement as well as an alleged violation of Liberty's trademark.

25. Based on Liberty's material breaches of the Agreement, ESS was relieved of performing under that Agreement. Moreover, ESS has completely paid off any and all amounts owed Liberty.

COUNT I
(Declaratory Relief)

26. ESS repeats and incorporates each of the preceding allegations.

27. Liberty's actions demonstrate that a real and substantial controversy exists between the parties here regarding the alleged breach of contract leveled by both sides as well as the violation of U.S. trademark laws asserted by Liberty and the torts committed by Liberty against Whitaker and ESS.

28. ESS therefore seeks a declaration that Liberty cannot recover on any claim against them, that it did not violate the U.S. trademark laws, and that Liberty in fact breached the franchise agreement first, thus relieving either Counterclaimant of any liability or requirement to perform under that Agreement.

COUNT II
(Breach of Contract)

29. ESS repeats and incorporates each of the preceding allegations.

30. Liberty's actions breached the franchise agreement between it and ESS, thus relieving ESS of any liability or requirement to perform under that Agreement. ESS seeks to recover all damages caused by the Liberty breach.

COUNT III
(Negligent misrepresentation)

31. ESS repeats and incorporates each of the preceding allegations.

32. The representations made by Liberty regarding the services and products it was to provide pursuant to the agreement were false, yet they were provided for Whitaker and ESS' benefit and guidance in association with their business knowing that Whitaker and ESS would, in fact, rely upon them.

33. ESS did, in fact, reasonably and justifiably rely upon the false representations provided by Liberty and proximately suffered damage as a result, the recovery for which Whitaker and ESS sue herein.

COUNT IV
(Tortious interference)

34. ESS repeats and incorporates each of the preceding allegations.

35. The actions by Liberty have directly interfered with ESS's business in that Liberty's contact with at least one known ESS customer and statement that the customer should not do business with ESS constitutes an intentional interference with an established business relationship for which ESS may recover all damages proximately caused by Liberty's actions.

COUNT V
(Breach of Implied Covenant of Good Faith and Fair Dealing)

36. ESS repeats and incorporates each of the preceding allegations.

37. The Agreement imposed upon Liberty a duty of good faith and fair dealing in its performance and its enforcement.

38. Liberty owed ESS a duty to act in good faith.

39. Liberty breached this duty by interfering with ESS's rights to receive the benefits of the Agreement by, inter alia, failing to provide marketing assistance, failing to provide usable tax preparation software, undermining Counterclaimants' franchise by supporting competing franchises and defaming Whitaker and ESS to its clients.

PRAYER FOR RELIEF

ESS respectfully requests that this Court summon JTH Tax, Inc. to appear, and that this Court ultimately grant Whitaker and ESS judgment for the following relief:

(a) A declaration that Whitaker and ESS owe nothing to JTH, that Whitaker and ESS have not violated U.S. trademark law, and that JTH has breached the franchise agreement,

(b) A judgment that Liberty's representations made regarding the services and products it was to provide pursuant to the agreement were false, that they were provided for Whitaker and ESS' benefit and guidance in association with Whitaker and ESS' business knowing that Whitaker and ESS rely upon them, that Whitaker and ESS did, in fact, reasonably and justifiably rely upon the false representations provided by Liberty, and that Whitaker and ESS proximately suffered damage as a result,

(c) A judgment that Liberty directly and tortiously interfered with ESS's business relations by its contact with at least one known ESS customer and statement that the customer should not do business with ESS, and that proximately suffered damage as a result of Liberty's actions;

(d) An award to Whitaker and ESS for all damages to which they show themselves entitled for the breach of contract, negligent misrepresentations, tortious interference and/or breach of the implied covenant of good faith and fair dealing described herein;

(e) An award of reasonable attorneys' fees and expenses incurred by Whitaker and ESS in prosecuting this action; and

(f) All other relief that law or equity justly entitles Whitaker and ESS to receive

KENYA WHITAKER
EASY SOFTWARE SOLUTIONS, LLC

By: /s/ Dennis J. Quinn________
Counsel for Kenya Whitaker and
Easy Software Solutions, LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of August, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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